

STATE OF MICHIGAN
COURT OF APPEALS

CASTLE INVESTMENT COMPANY,

Plaintiff-Appellant/Cross Appellee,

v

CITY OF DETROIT,

Defendant-Appellee/Cross
Appellant.

UNPUBLISHED

March 15, 2005

No. 224411

Wayne Circuit Court

LC No. 98-836330-CZ

ON REMAND

Before: Cavanagh, P.J., and Whitbeck, C.J., and Jansen, J.

PER CURIAM.

Pursuant to our Supreme Court's directive following its reversal of our previous decision to affirm the trial court's dismissal of this action on the ground that plaintiff's challenge to the validity of the disputed ordinance was barred by laches, we consider defendant's cross-appeal and reverse. See *Castle Investment Co v Detroit*, 471 Mich 904; 688 NW2d 77 (2004).

In brief, plaintiff brought a claim challenging the enforcement of Detroit Ordinance 124-H which requires city inspections and certificates of approval before the sale of one- and two-family homes. Plaintiff argued that the ordinance was unenforceable because a list of inspection guidelines, developed by the Buildings and Safety Engineering Department, had not been approved by the city council as specifically required by the ordinance before becoming effective. Defendant moved for summary disposition on the ground that the provision requiring city council approval was invalid as a violation of the separation of powers provisions of the city charter but the trial court denied the motion. Subsequently, both parties moved for summary disposition with defendant arguing, in part, that plaintiff's claim was barred by laches. The trial court agreed with defendant, as did this Court, holding that laches barred the action. *Castle Investment Co v Detroit*, unpublished opinion per curiam of the Court of Appeals, decided March 19, 2002 (Docket No. 224411). After granting leave to appeal, our Supreme Court rejected the laches analysis and held that the ordinance was unenforceable because the city council never approved the inspection guidelines. *Castle Investment Co, supra* at 905. The case was remanded back to this Court for consideration of defendant's issue on cross-appeal. *Id.* The issue on cross-appeal is whether the trial court erred in denying defendant's first motion for summary disposition requesting dismissal on the ground that the approval requirement is invalid because it conflicts with the separation of powers provisions of the city charter.

The Detroit Home Rule Charter provides for the separation of legislative and executive powers. Article 4 creates the legislative branch which is headed by the city council and Article 5 creates the executive branch which is headed by the mayor. The ordinance at issue provides, in relevant part:

The department [Buildings and Safety Engineering Department] shall prepare a list of inspection guidelines to be used in inspection relating to the enforcement of this article. The guidelines shall constitute the complete scope of repairs required for the issuance of the certificate or to be noted in an inspection report. The guidelines shall not be effective until approved by city council. The inspection guidelines shall be issued to the applicant for certificate of approval or inspection report and made available free of charge to the general public. The city shall notify the general public, as the city council shall recommend by resolution that the guidelines exist and are available. [Ordinance 124-H, Detroit City Code, § 26-3-6 (formerly § 12-7-6).]

Defendant argues that separation of powers provisions of the charter prohibited the council-approval requirement in the ordinance since the Buildings and Safety Engineering Department is part of the executive branch and the city council is prohibited from giving orders to executive branch officers and employees.¹ In other words, the approval requirement conflicts

¹ Some pertinent charter provisions, include:

Sec. 4-113. Prohibition on interference in administration. Except for purposes of inquiries and investigations, the city council or its members shall deal with city officers and employees who are subject to the direction and supervision of the mayor solely through the mayor, and neither the city council nor its members shall give orders to any such officer or employee, either publicly or privately.

Sec. 4-114. City action requiring an ordinance. In addition to other acts required by law or by specific provision of this Charter to be done by ordinance, those acts of the city shall be by ordinance which:

1. Provide a penalty or establish a rule or regulation for violation of which a penalty is imposed;

* * *

Sec. 4-119. Veto. Every ordinance or resolution of the city council, except quasi-judicial acts of the city council including any under . . . of this Charter, shall be presented by the city clerk to the mayor within four (4) business days after adjournment of the meeting at which the ordinance or resolution is adopted.

The mayor, within seven (7) days of receipt of an ordinance or resolution, shall return it to the city clerk with or without approval, or with a veto and a written statement explaining the veto. . . .

(continued...)

with the mayor's veto power and with the rulemaking power of the executive branch. Defendant relies on the analogous case of *Blank v Dep't of Corrections*, 222 Mich App 385, 396; 564 NW2d 130 (1997), which our Supreme Court subsequently affirmed in a plurality opinion but modified, 462 Mich 103 (2000), for the proposition that legislative interference with a delegation of rulemaking authority is not permitted "until altered or revoked by law," as required by Article 4 of our Constitution (all legislation must be by bill passed by both houses of the Legislature and presented to the Governor before becoming law). In other words, a committee of the Legislature could not veto administrative rules proposed by an executive agency delegated such rulemaking authority. *Blank, supra* at 396-397.

The trial court rejected defendant's argument on the ground that, here, unlike the case in *Blank*, the approval of the proposed inspection guidelines would be by the entire legislative body—the city council. We conclude, however, that the council-approval requirement is invalid because it permits interference with delegated rulemaking authority short of ordinance or resolution by simply doing nothing. That is, because the council-approval requirement does not ensure express legislative approval or disapproval of the guidelines, the council could effectively veto the inspection guidelines without taking any legislative action, rendering the guidelines a nullity and the nullification would not be by ordinance or resolution subject to veto by the mayor. The mayor, then, would be shut out or silenced on the issue. Thus, the ordinance violates the separation of powers provisions of the charter.

Next, we consider whether the invalid provision is severable. The Code includes the following provision:

Should any section, paragraph, sentence, clause, phrase or word of this Code be declared invalid or unconstitutional by a court of competent jurisdiction, such invalidity or unconstitutionality shall not affect any of the remaining words,

(...continued)

* * *

Sec. 5-102. The executive branch. Except as otherwise provided by law or this Charter, executive and administrative authority for the implementation of programs, services and activities of city government is vested exclusively in the executive branch.

* * *

Sec. 5-106. Powers and duties of department directors. Except as otherwise provided by law or this Charter, the director of each department of the executive branch shall:

* * *

4. Prepare reasonable rules governing dealings between the department and the public. A rule becomes effective in accordance with section 2-111 [which governs rulemaking].

phrases, clauses, sentences, paragraphs or sections of this Code, since the same would have been enacted by the city council without the incorporation in this Code of any such invalid or unconstitutional word, phrase, clause, sentence, paragraph or section. [Detroit City Code, § 1-1-10.]

In *Jott, Inc v Charter Twp of Clinton*, 224 Mich App 513, 547-548; 569 NW2d 841 (1997), quoting *Pletz v Secretary of State*, 125 Mich App 335, 375; 336 NW2d 789 (1983), this Court applied a similar principle to a zoning ordinance:

The doctrine of severability holds that statutes should be interpreted to sustain their constitutionality when it is possible to do so. Whenever a reviewing court may sustain an enactment by proper construction, it will uphold the parts which are separable from the repugnant provisions. To be capable of separate enforcement, the valid portion of the statute must be independent of the invalid sections, forming a complete act within itself. After separation of the valid parts of the enactment, the law enforced must be reasonable in view of the act as originally drafted. One test applied is whether the law-making body would have passed the statute had it been aware that portions therein would be declared to be invalid and, consequently, excised from the act.

Here, deleting the council-approval requirement and the associated resolution provision regarding notification to the general public would leave intact the Buildings and Safety Engineering Department's preparation of the inspection guidelines and the requirement that they be used in conjunction with the issuance of a certificate of approval or inspection report. This result, not the council approval, was the ultimate goal of the ordinance, i.e., to ensure that dwellings meet certain minimal standards of liveability and habitability before sale or conveyance. Thus, the valid portions are independent of the invalid sections and form a complete act within itself. In addition, enforcement of this revised act would be reasonable in view of the act as originally drafted. Further, through § 1-1-10 of the charter, the city council expressly provided for severance of the offending language and indicated that "the same would have been enacted by the city council without the incorporation in this Code of any such invalid or unconstitutional word, phrase, clause, sentence, paragraph or section." There is no evidence that the council would have declined requiring certificates of approval or inspection reports consistent with the requirements established by the guidelines provided by the Buildings and Safety Engineering Department if not permitted approval authority of the guidelines. Therefore, we conclude that the invalid provisions may be severed from the ordinance.

However, a question remains as to whether the Buildings and Safety Engineering Department followed valid rulemaking procedures in developing the inspection guidelines. Plaintiff argued below that the procedures outlined in § 2-111 of the City Code were not followed, specifically, the notice and hearing requirements, and the trial court held that plaintiff stated a claim precluding summary disposition under MCR 2.116(C)(8) on this ground. Since it does not appear that a factual determination regarding the validity of the guidelines was ever rendered, we remand the matter to the circuit court for such determination. If the court concludes that the ordinance is invalid because rulemaking procedures were not followed, it should enjoin further enforcement of those guideline provisions unless and until there is compliance with such procedures.

In sum, the council-approval requirement provision of the ordinance is invalid for the reason that it violates the separation of powers provisions of the charter. Thus, we reverse the trial court on this issue. However, the council-approval provision and the provision requiring a resolution to announce the guidelines are severable from the ordinance. But, because it is unclear from the record whether the rulemaking procedures of the City Code were followed in developing the inspection guidelines, we are unable to conclude that the trial court erred in denying defendant's first motion for summary disposition pursuant to MCR 2.116(C)(8). Therefore, we remand the matter to the trial court for further consideration of this issue.

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Mark J. Cavanagh
/s/ William C. Whitbeck
/s/ Kathleen Jansen